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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1497

CATHERINE C. ALFREE, Appellant

v.

EDWIN W. ALFREE, JR., Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Catherine C. Alfree, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Judgment entered by the Supreme Court of the State of Delaware in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion appealed from of the Supreme Court of the State of Delaware appears at 410 A.2d 161 and is included herein as Appendix "A", (p.p. A-1). The opinion of the Supreme Court of the State of Delaware dated August 16, 1979, is included herein as Appendix "B", (p.p. A-8). The opinion of the Superior Court dated February 2, 1979, was unreported and a copy is attached hereto as Appendix "C" (p.p. A-10).

GROUNDS OF JURISDICTION OF SUPREME COURT

JURISDICTION

This Appeal arises from an action to recover compensatory damages for personal injuries arising from an automobile accident which occurred on June 26, 1976. The judgment of the Supreme Court of the State of Delaware was entered on the 26th day of December, 1979. A timely notice of appeal was filed on the 24th day of March, 1980, in the Supreme Court of the State of Delaware and in the Superior Court of the State of Delaware. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §1257(2). This appeal draws into question the validity of Delaware statutory law on the ground that it is repugnant to the Constitution of the United States, and the decision appealed from was in favor of its validity.

The judgment appealed from was rendered on December 26, 1979, and a timely notice of appeal was filed on March 24, 1980, in the Supreme Court of the State of Delaware and the Superior Court of the State of Delaware, in and for New Castle County.

The following cases are believed to sustain jurisdiction over this appeal: Williams v. Bruffy, 96 U.S. 176, 24 L.Ed. 716 (1878); Railroad Co. v. McClure, 77 U.S. 511, 19 L.Ed. 997 (1871).

STATUTES INVOLVED

For purposes of 28 U.S.C. §1257(2) the Delaware statute which is being considered with respect to its validity is the common law doctrine of interspousal tort immunity. The doctrine states:

> "That one spouse may not sue the other in tort".

This common law doctrine of interspousal tort immunity is the controlling law in the State of Delaware based upon Delaware's Constitution of 1897, which incorporates the common law of England into the law of the State of Delaware. Section 18 of the Schedule to the Delaware Constitution of 1897 provides:

> "All laws of this State existing at the time this constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws."

The common law of England is part of the law of the State of Delaware. It was first adopted in the Constitution of 1776, Article XXV. The same section was reenacted in each of the three succeeding constitutions. The Constitution of 1792, Article VIII, §10; The Constitution of 1831, Article VII, §9; and most recently in §18 of the Constitution of 1897. Thus, the Doctrine of Interspousal Tort Immunity constitutes a statute for purposes of this appeal.

QUESTIONS PRESENTED

Does the Delaware doctrine of interspousal tort immunity deny a married individual life, liberty or property without due process of law and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF CASE

The facts of the case underlying this appeal are as follows:

This action arises out of an automobile accident which occurred on June 26, 1976, in Kent County, Delaware. On that date plaintiff Catherine C. Alfree was an occupant of a 1957 Chrysler Newport, operated by her husband, Edwin W. Alfree, Jr.

The accident in issue occurred on County Route 90, approximately one half mile west of the town of Smyrna and seven tenths of a mile north of County Route 145. At that time and place the vehicle in which plaintiff was a passenger, was travelling at an excessive rate of speed, left the road and struck a utility pole and tree. As a result of this accident, Mrs. Alfree sustained numerous serious injuries, including a right leg amputation. Another passenger in the vehicle, one James Starkey, lost his life in this same collision. As a result of his wanton and reckless acts, Mr. Alfree plead nolo contendere to the crimes of failing to keep a proper lookout and failing to maintain proper control of his vehicle for which he was sentenced to a period of imprisonment. The parties to the present action are separated and Mr. Alfree has indicated to Mrs. Alfree that he is presently living with another woman and is taking steps to secure a divorce.

Prior to the accident, Mrs. Alfree was employed at a job which required that she work in a standing position for extended periods of time. Since the accident she has been unemployed for all but one month when she attempted to return to her job, but found she was unable to perform her duties due to the amputation of her leg. Presently Mrs. Alfree is on public assistance and has responsibility for caring for her children.

A law suit was filed on or about the 22nd day of September, 1977, in the Superior Court of the State of Delaware, in and for New Castle County, in which Catherine Alfree sought to recover damages for Mr. Alfree's negligent, wanton and reckless conduct.

Based upon these facts, defendant-appellee, filed a motion for summary judgment which was granted February 2, 1979. The Court granted defendant summary judgment in his favor based upon the doctrine of interspousal tort immunity. Plaintiff filed a notice of appeal on February 8, 1979, to the Supreme Court of the State of Delaware where the issue of interspousal tort immunity was briefed and orally argued before a three Judge panel of the Supreme Court of the State of Delaware. On August 16, 1979, the three Judge panel affirmed the lower court's order granting summary judgment.

Plaintiff then filed a motion for rehearing en banc pursuant to Temporary Rule 200 and a motion for reargument pursuant to Rule 18 of the Supreme Court of the State of Delaware Rules. On September 28, 1979, the Court granted plaintiff's request for a rehearing before the Court en banc. In its order granting the rehearing, the Supreme Court of the State of Delaware sua sponte requested the parties to exchange briefs on the following question:

> "Does the doctrine of interspousal tort immunity, as established by the Delaware case law, violate the plaintiff's due process or equal protection rights under the Fourteenth Amendment of the United States Constitution?"

These issues were briefed and orally argued before the Court en banc at the rehearing.

On December 26, 1979, the Supreme Court of the State of Delaware, in a per curiam opinion, affirmed the granting of summary judgment in favor of the defendant-appellee. That decision upheld the application and doctrine of interspousal tort immunity and held that the doctrine's bar to plaintiff's cause of action did not violate plaintiff's due process or equal protection rights under the Fourteenth Amendment of the Constitution of the United States.

With respect to the constitutional issues raised by the Supreme Court and briefed and argued before it on the rehearing, the Supreme Court of the State of Delaware stated in its December 26, 1979, opinion, at 410 A.2d 163:

"Finally, as to the federal due process and equal protection clauses, little law directly applicable has been brought to our attention. The strongest precedent is Paiewonsky v. Paiewonsky, 3rd Cir., 446 F.2d 178, (181-182, 1971, Cert. denied) 405 U.S. 919, 92 S. Ct. 944, 30 L.Ed. 2d 788 (1972). In that case, our former Chancellor, now Chief Judge Seitz of the Federal Circuit which includes Delaware, writing for the three Judge panel, found no violation of equal protection in the alleged discrimination resulting from the doctrine of interspousal immunity. The Court said it '(had) not been convinced that

the immunity doctrine lacked substantial vitality' and, 'it follows that it has a reasonable relationship to the (promotion of domestic tranquility) interest sought to be furthered by it'. See also Brawner v. Brawner, Mo. Supr., 327 S.W. 2d, 808, 815 (1959). Other courts in rejecting equal protection claims have noted that the doctrine applies to husbands as well as wives. See Locklair v. Locklair, DSC 256 F. Supp. 530 530 (1960); Smith v. Smith, Pa. Super., 361 A.2d 756, 757 (1976). Due process claims have faired no better evidently on the ground that a spouse does not have a property interest in a cause of action not recognized by common law or on the ground that any such property interest in a suit against a spouse is lawfully restricted in a manner of public concern by the State's police power. Heckendorn v. First National Bank, supra., 166 N.E. 574; Brawner v. Brawner, 327 S.W. 2d at 814-815; Smith v. Smith, supra., 361 A.2d 757. Thus, based on current precedent, there appears to be no federal constitutional limitation on the interspousal immunity doctrine. We so hold."

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions in that the doctrine of interspousal tort immunity, as construed by Delaware's highest court impermissibly encumbers and interferes with a spouse's fundamental right to

marry in that it bars the spouse from suing his or her tortfeasor spouse. By barring an injured spouse from suing his or her tortfeasor spouse where such suit would be permitted absent the marital relationship, the Delaware doctrine of interspousal tort immunity deprives a married tort victim of life, liberty and property without due process of law. Furthermore, it denies the injured spouse the equal protection of the law and right to access to the courts. To the extent the rule treats spouses as a class differently from all other tortiously injured victims, the rule deprives plaintiff of the equal protection of the laws. Finally, the doctrine improperly interfers with an individuals fundamental rights of personal security and access to the courts.

THE DELAWARE LAW OF INTERSPOUSAL TORT IMMUNITY VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW AND DEPRIVES APPELLANT OF LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNTIED STATES CONSTITUTION.

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution state:

> "No State shall make or enforce any law which shall. . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the United States has developed a three approaches to the application of the Fourteenth

Amendment. The first approach applies what is commonly known as the "strict scrutiny" or "compelling State interest test". The second approach is commonly referred to as either the "minimal scrutiny" or "rational relationship test". The third follows a middle path.

The first approach, the strict scrutiny test, is applied to classifications involving rights known as fundamental. They are rights such as the right to travel, to vote, to marry, etc. This test is also applied when the classification is predicated upon certain suspect classifications such as race, alienage or national origin. In the case at bar, we are not concerned with a suspect classification, we are concerned with a classification scheme involving fundamental rights.

The Delaware rule of interspousal tort immunity classifies married individuals and treats them differently from all similarly situated tortiously injured victims. Furthermore, the doctrine burdens an individual's right to marry in that it requires an individual who marries to give up his or her right to sue his or her spouse for damages should the spouse tortiously, recklessly or intentionally injure the individual. Additionally, the doctrine as applied in Delaware, has the effect of denying an injured party his or her right to petition the court for redress of a tortious wrong and thus undermines an individual's inalienable right to personal security.

Under the strict scrutiny standard there is no presumption that the law or rule in question is constitutional, rather unless the Stateshows a compelling

state interest which necessitates the rule the law is unconstitutional. Furthermore, when the strict scrutiny standard is applied the burden is placed upon the one seeking to permit the classification based on a fundamental right to demonstrate that the rule is necessary to promote a compelling governmental interest and that there is no reasonable way to achieve these goals with a lesser burden on the constitutionally protected activity. Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 274 (1972).

The second approach, the minimal scrutiny test is normally applied in cases in which neither fundamental rights nor suspect classifications are involved. Under this standard the statute is presumed to be constitutional. Initially, the Court examines the law to determine whether its subject matter involves a legitimate concern of the State and secondly whether the statute is a reasonable tool for that purpose. The statute is sustained if the class is rationally related to a legitimate state interest and is not patently arbitrary. McGowan v. Maryland, 366 U.S. 426, 81 S. Ct. 1101, 6 L. Ed. 2d 393, (1961).

Recently the United States Supreme Court has moved away from the rigid choice between the strict scrutiny test and the minimal scrutiny test adopting, in some cases, a more equitable and flexible approach. Under this middle standard, the Court considers evidence concerning the nature of the unequal classification under attack, the nature of the rights adversely effected, and the governmental interest urged in support of the classification. After considering

all of the evidence the Court then determines whether the classification has been proven by facts to be substantially related to the object of the rule. See Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). Under this middle standard the Court examines the actual empirical relationship between the classification and its governmental object. The Court, also considers whether there is a less restrictive means of achieving these goals.

Thus, there are three tests which the Courts use in analyzing the equal protection issues presented by the facts of this particular case.

To determine which test the Court must apply, the nature of the rights at issue must be identified. It is only because of plaintiff's and defendant's marital status that we are before the Court. Absent the taking of the marriage vows Catherine Alfree could sue Edwin Alfree to recovery compensatory damages. Mr. Alfree recklessly and wantonly violated statutory standards of care designed to protect all users of the highways. If Mrs. Alfree was not the wife of the defendant, that is, had she been a passenger, another driver, a pedestrian, the driver's mother or even had she been the driver's child she would not be barred from the right to sue for damages. In fact, if Mr. and Mrs. Alfree had not married but rather had chosen merely to live together for the rest of their lives and to raise a family, then she would be able to sue for damages arising from an accident such as this. If defendant's son, mother, friend or mistress were injured they could sue to recover compensatory damages. The only passenger who could not sue would be

plaintiff. The rule of interspousal tort immunity as applied separates individuals who have exercised their fundamental right to marry from others and denies those individuals their inalienable right to personal security and their Constitutional right to access to the Courts. Thus, married individuals are penalized and the rule as applied, burdens and impinges upon plaintiff's fundamental rights of marriage, access to the courts and personal security.

A. THE STRICT SCRUTINY TEST IS APPLICABLE TO THE CASE AT BAR BECAUSE FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED.

The "strict scrutiny" test is directly applicable to the case at bar. The right to marry is clearly implicated in this case because the rule of interspousal tort immunity is based solely on the marital relationship. The United States Supreme Court has made it clear that the right to marry underlies the purposes of the Constitution and although not expressly mentioned in it, it is a fundamental right afforded protection by the First, Fifth and Fourteenth Amendments of the United States Constitution.

> "Marriage is one of the 'basic civil rights of man' fundamental to our very existance and survival." Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. (1967).

Similarly, in Griswold v. Connecticut, 381 U.S. 479, 495, 85 S. Ct. 1678, 1688, 14 L.Ed. 2d 510 (1965), it was observed:

> "The entire fabric of the Constitution and purposes that

> clearly underly its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

The right to marry, although not "expressly" enumerated by the Constitution is a fundamental right which must be accorded the same protection and respect as those rights expressly enumerated in the Bill of Rights.

The case of O'Neil v. Dent, 364 F. Supp., 565 (E.D. N.Y., 1973), considered whether the United States Merchant Marine Academy could constitutionally dismiss a cadet because he married in violation of Academy regulations and his personal contract with the school. Plaintiff argued that the regulations impermissibly interfered with and encumbered his fundamental right to marry. He also argued the regulations deprived him of due process of law and to the extent the regulations treated all married students as a class differently from all others similarly situated the regulations deprived him of equal protection of the law.

The O'Neil Court held the regulations unconstitutional because the right to marry was a fundamental right and there was no compelling state interest to justify the regulations.

The government in O'Neil had argued that the regulations involved bore a rational relationship to legitimate academy purposes and that they were justified by a compelling state interest. The government asserted that the opportunity

to attend the academy was merely a privilege and as such, the no marriage rule did not deny an individual his fundamental right to marry. In response to these arguments the Court stated:

> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . ." (Pg. 570). (Emphasis supplied).

The O'Neil Court continued:

> "That the government may not condition receipt of benefits upon the waiver direct or otherwise--of constitutionally guaranteed liberties is no longer open to question. The effect to impose such conditions has been denied repeatedly. . ." (Pg. 570).

The Court held the unconstitutional regulations could not be upheld on the ground that they simply denied access to a mere privilege. Classifying the object as a privilege does not relieve the State from the obligations of reasonableness and non-arbitrary treatment.

In this case, the right to marry is at the very heart of the rule of interspousal tort immunity. Only individuals injured through the tortious acts of their spouse are completely barred from recovering compensatory damages. Furthermore, in the case at bar we are not dealing with a "mere privilege", but rather we are dealing with additional fundamental and inalienable natural rights protected by the Constitution, the

right to personal security and the constitutional right to access to the courts.

In the case at bar the rule in question treats married individuals as a class differently from all other tortiously injured automobile accident victims and as such deprives this class of the equal protection of the laws. This class is, by application of the doctrine, deprived of their fundamental right to "personal security" and their right of "access to the courts".

> "The right of personal security is a natural right and is guarded by various provisions of the State and Federal Constitutions, derived in part from the Magna Charta and other charters of English liberty and reinforced by additional and more specific injunctions. The guarantees included in the right to personal security are secured against abridgement by the States through the Fourteenth Amendment." 16 C.J.S. Constitutional Law §205. (Emphasis supplied).

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. 16 C.J.S. Constitutional Law §205; In Bednarik v. Bednarik, NJ Ch. 16 A. 2d 80 (1940), it was established:

> "Under the English Common Law and under our American Constitutional Law, natural rights are such as appertain originally and essentially to each

person as a human being, as a member of organized society and as a citizen of free government. They are rights recognized as inherent in the individual member of the State, personal and absolute and inalienable. Among these rights is that of personal security." (Pg. 89, 90). (Emphasis supplied).

In the case at bar, the plaintiff has had this fundamental right of security violated and because she is married she is treated differently than if she were not. A corollary to this right of security is the constitutional right to free access to the courts. As was stated in California Transport v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972).

"Certainly the right to petition extends to all departments of the government. The relief of access to the courts is indeed but one aspect of the right to petition." (Pg. 646, 510).

Thus, the right to petition guaranteed by the First Amendment to the United States Constitution protects the right of all individuals to access to the Courts. Similarly, the Delaware Constitution at Article I §9, establishes:

"All courts shall be open; and every man for an injury done him in his. . .person. . .shall have remedy by due course of law, and justice administered according to the very right of

the cause and the law of the land. . ."

Thus, both the Federal Constitution and State Constitution establish that there exists a fundamental right of access to the courts to seek redress for wrongs. The right is one of the basic rights accorded individuals in an ordered, democractic society. As interpreted in Robb v. Pennsylvania Railroad, Del. Supr., 210 A.2d 709 (1965):

"It is the duty of the Courts to afford a remedy and redress for every substantial wrong." (Emphasis supplied).

It is the essence of our civil laws to achieve justice and in so doing provide redress for wrongful injury. 5 Pound Jurisprudence Ch. 32 "Duties of Reparation" 283-346 (1959); Holmes, The Common Law 76 (Howe Ed. 1963). As the United States Supreme Court has recently recognized, this great impulse of our law applies with special force in the tort area where:

". . .over the centuries the common law. . . has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by violation of his legal rights." Carey v. Piphus, 435 U.S. 247, 257, 98 S. Ct. 1042, 1049, 55 L. Ed. 2d 252, 261 (1968).

In view of the fact that there are three fundamental rights which are interfered with or burdened by the application of the rule of interspousal tort immunity, the Court should apply the strict

scrutiny test as the proper standard of review. Under this test, as previously stated, the burden is placed upon the defendant to demonstrate that the rule is necessary to promote a "compelling state interest" and that there is no other reasonable means to achieve the stated goal which would impose a lesser burden on these constitutionally protected rights. No compelling State interest exists. O'Neil v. Dent, surpa.

The reason most often proffered in support of this classification scheme is the State's interest in preserving domestic tranquility. There is absolutely no evidence in the record tending to affirmatively establish that the bar of interspousal tort immunity is factually related to the preservation of domestic tranquility. The fatal vice of the rule is that there is a sweeping advance determination that every married person who sues his spouse in tort thereby diminishes the domestic tranquility presumed to be shared by them. Courts which have recently reviewed this justification for maintaining the doctrine note that in the rare instance where a spouse will sue his or her spouse depsite the spouse's objection there is probably not much tranquility to preserve. Koplik v. C. P. Trucking Corp., NJ Supr., 141 A.2d 42 (1958). In Immer v. Risko, NJ Supr., 267 A.2d 481 (1970), the Court stated:

> "We are doubtful that the marital relationship will be any more disturbed by allowing a cause of action than by denying it. . .A person would not sue his spouse if there were perfect harmony and it is unlikely that adjudication of the rights will worsen the relationship."

In this same vein the anomaly of sustaining domestic harmony as a basis for imposing immunity has already been recognized by the Courts of Delaware in the judicial treatment of interfamily tort actions, a distinctly analogous area. The dominant philosophy underlying the rule of interfamily tort immunity was the preservation of the family relationship and this thinking has been rejected in Delaware. See Williams v. Williams, Del. Supr., 369 A.2d 699 (1976).

Another factor which should be considered in the Court's analysis is the prevalence of automobile insurance in today's society. There is no danger of domestic tranquility being disturbed by an action in tort by a spouse against a spouse who carries insurance.

> "The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will, in most cases, be paid by the insurance carrier rather than by the defendant spouse. . .Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage." (Immer v. Risko, NJ Supr., 267 A.2d 481 (1970)). (Emphasis supplied).

Thus, the danger of marital disruption becomes academic when liability insurance is available.

Finally, there is, in addition to all else, a certain mischief in the unspoken assumption at the heart of the domestic tranquility rationale, namely, that in this context courts are somehow fit to monitor marital morality. Courts can claim no penetrating insight by which to fathom the impact of an interspousal law suit or gauge its affect upon the strength or fragility of a marriage. The threat to domestic tranquility by legal action between spouses is an imponderable; the cohesiveness of a marriage may be jeopardized as much by barring the suit as by allowing it. Merenoff v. Merenoff, NJ Supr., 288 A.2d 951 (1978). The success and the happiness of a marriage belongs to the individuals themselves and the right to make decisions relating to the marriage is personal and private and should not be interfered with or burdened by a court made rule. Delaware has clearly recognized this by the recent liberalization of its divorce laws which permit "no-fault" divorce. 13 Del. C. Chpt. 15. Thus, Delaware has legislatively declared that it does not have a compelling State interest, in preserving marital harmony and tranquility. In final analysis the choice to sue or not to sue should be that of the parties to the marriage who as individuals are entitled to seek their personal happiness according to their own independent rights. It is unproven and at best extremely doubtful that economic coercion is a proper method of preserving domestic tranquility.

Application of rule deprives married individuals as a class of the equal protection of the laws. Absent the marriage relationship there is no question that the plaintiff would have the right to sue to seek compensatory damages for the

injuries done to her. Thus, the constitutionally protected right to marry is burdened by requiring married individuals to forego their individual constitutional right of access to the courts and their fundamental right to personal security. Married individuals as a class are being treated differently from others in similarly situated circumstances. They are not being deprived of a mere privilege as in O'Neil v. Dent, cited supra., but are being deprived of fundamental personal rights protected by the Constitution.

B. ASSUMING THE COURT SHOULD APPLY THE MIDDLE STANDARD THE CLASSIFICATION IMPOSED BY THE RULE IS NOT FACTUALLY RELATED TO THE PRESERVATION OF DOMESTIC TRANQUILITY.

Should the Court apply the "middle standard", plaintiff asserts that the classification involved is not, in fact, substantially related to the object of the court made rule. Applying this rationale the classification must be reasonable and not arbitrary and must rest upon some ground having a fair and substantial relation to the object of the rule, so that all persons in similar circumstances shall be treated alike. See Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-254, 30 L. Ed. 2d 225, 229 (1971).

> "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The Courts must reach and determine the question whether classifications drawn in a statute are reasonable in light of its

purpose. . ." McLaughlin v. Florida, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed. 2d 222, 228 (1964).

Thus, the question presented is whether a difference in the marital status of tortiously injured victims bears a substantial relationship to a valid state objective. Once again, the preservation of domestic tranquility is the express state objective of the rule.

In this respect, it is interesting to note that this rule and classification has never once been endorsed by the State legislature but rather is a vestigal remnant of law no longer supported by the social concepts and policies of today's society. Here, too, it is important to note that the Supreme Court of Delaware in the case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), abrogated the rule of intrafamily tort immunity. In doing so, it permitted children, through their appointed next friend, (their father) to sue their mother for injuries resulting from an automobile accident. The children in Williams and plaintiff in the case at bar are similarly situated. Why then are they treated differently? In Williams, the father was, in essence, suing the mother, his spouse. There is no distinction between that case and the one at bar which justifies the radically different treatment imposed here by the application of a Delaware law. The classificatiton fails because it penalizes injured spouses by depriving them completely from recovering for injuries caused by their spouse. The loss of life or a limb should not become less worthy of compensation because the injured party happens to be married to the party who caused same. It is irrational to reward

a spouse by allowing him or her to abandon his duties owed to all others by denying the injured spouse from being compensated for the loss suffered. There is no rational basis for withdrawing protection from a spouse and at the same time providing protection to children, guests, pedestrians and others traveling or using the highways.

The taking of the marriage vow forms no substantial rational basis for denying plaintiff the equal protection of the law. Thus, plaintiff has been denied equal protection of the law under the middle standard.

C. THE RULE OF INTERSPOUSAL TORT IMMUNITY SHOULD NOT BE ANALYZED UNDER THE MINIMUM SCRUTINY TEST BECAUSE FUNDAMENTAL RIGHTS ARE INVOLVED AND THE MINIMUM SCRUTINY TEST IS BASED ON A POLICY OF DEFERENCE TO LEGISLATIVE PEROGATIVE NOT PRESENT IN THIS CASE.

Finally, it is necessary to discuss the applicability of the third test, the so called "minimum scrutiny" standard. This test does not apply because as previously indicated there are fundametal rights involved and due to this the minimum scrutiny test is not a proper method of analysis. Without considering the nature of the rights involved, still with respect to this test, it is plaintiff's position that it does not apply. In employing this test the courts have traditionally upheld any classification based upon any state of facts that reasonably can be conceived to constitute a distinction or difference in state policy. Thus, the application of this test is based on reasonable deference to state objectives and their formulation by the legislature.

This deference accorded the legislature's judgment is normally quite proper. It is based on the policy that the elected members of the legislature are more closely in touch with the problems, needs and preferences of the people. It is reasoned that the legislature has access to facts, as well as advice, to an extent the courts cannot equal.

In the case at bar, the "deference" embodied in the minimum scrutiny test is inapplicable. We are dealing with a classification based on the common law, a judge made rule embodied in the Delaware Constitution, and not a statute specifically enacted by the legislature. There has been no endorsement of this classification by the legislature. There has been no fact finding and no reliance on expert advice by the legislature. Rather, we are confronted with a judge made classification formulated eons ago based upon the problems, needs and preferences of a society long since past. Based upon this analysis the minimum scrutiny rule should not be employed.

D. SHOULD THE COURT APPLY THE MINIMUM SCRUTINY TEST THE RULE IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND THE DISCRIMINATIONS IMPOSED BY THE RULE ARE PATENTLY WITHOUT REASON.

Should the Court decide to apply the minimum scrutiny test then the classification to pass constitutional muster need only bear a rational relationship to the accomplishment of a valid state purpose. In this analysis, there is a presumption that the rule is constitutional.

As was stated in Stratton v. Travis, Del. Super., 380 A.2d 985 (1977):

> "Under the rational or traditional equal protection analysis, a Legislative classification may not be struck down unless it is obviously arbitrary; except in the case of a statute whose discriminations are so patently without reason that no conceivable factual situations could be found to justify them. The party who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality." (Pg. 987). (Emphasis supplied).

In this case, we are not confronted with a legislative classification. The purpose behind the questioned classification is the judicial statement that it is in the State's interest to preserve domestic tranquility. It is plaintiff's position that the classification in question is arbitrary because it is not factually related to the stated goal and its application is both illogical and unsound when viewed in a realistic fashion. Furthermore, its discriminations are patently without reason. Today's society has changed considerably since the law was originally formulated and as noted in Stratton:

> "A statute, valid when enacted, may become invalid by change in the conditions to which it is applied." (Pg. 988).

Thus, where the conditions have changed and the rule fails to bear a rational relationship to a valid state purpose, the rule must be considered unconstitutional.

In the case at bar, the rule lacks a rational relationship to the actual state of facts which surround its operation. The argument that the rule tends to enhance domestic tranquility is especially hard to take seriously when advanced by an insurance company. Either domestic tranquility has ended before the suit is brought or the situation is such that the domestic tranquility will not be affected by the action. In a practical sense, it is the injury coupled with the inability to be compensated that produces the lack of harmony. Klein v. Klein, Cal. Supr., 376 P.2d 70 (1962), Williams v. Williams, Del. Supr., 369 A.2d 669 (1976).

In the case of Rogers v. Yellowstone Park Company, Ida. Supr., 539 P.2d 566 (1975) the Court found the conjugal harmony argument to be both unsound and illogical. The Court stated:

> "It is difficult to perceive how a personal action would disrupt the tranquility of the marital estate to any greater degree than would actions in partition, ejectment or for contesting wills all of which actions now may be maintained by a wife against her husband where such actions involve her separate property." (Pg. 569).

A further weakness in the marital tranquility argument is expressed in the

case of Immer v. Risko, NJ Supr., 267 A.2d 481 (1970). The Court stated at page 484-485:

> "But realistically, it must be remembered when dealing with the question of conjugal harmony that today virtually every owner of a motor vehicle with a sense of responsibility carries liability insurance coverage. The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will in most cases be paid by the insurance carrier rather than by the defendant spouse. . . Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage. The cost of making the injured spouse whole would necessarily come out of the family coffers, yet a tortfeasor spouse surely anticipates that he will be covered in the event that his negligence causes his spouse injuries. This unexpected drain on the family's financial resources could likely lead to an interference with the normal family life. And it is doubtful that this void in insurance coverage would comport with the reasonable expectations of the insured that this Court has so often sought to protect. (Citations omitted). In short, the immunity doctrine cannot be fairly sustained on the basis that negligence suits between husbands and wives will disrupt the harmony of the family."

(Pg. 484-485). (Emphasis supplied).

Both of these arguments are persuasive here. The parties are separated. In this case Mr. Alfree left the plaintiff, his wife, Mrs. Alfree, to reside with another woman who was en ventre se mere. Prior to this tortious conduct, Mrs. Alfree was self-sustaining, however, because she lost her leg and cannot support herself on the prosthesis she is unable to supply an income for herself and her children. Currently she is on public assistance. These circumstances are far more in accord with the hard realities of life than the bromides that led to the interspousal tort immunity thesis. A bad idea should not anymore be retained because it has a history than a poor idea be adopted anew.

In the case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), the Court was concerned with whether the doctrine of parental tort immunity should be made a Delaware rule. The principal argument advanced for maintaining that doctrine was the very same concern for preserving domestic tranquility.

In its analysis of that policy the Court stated:

> "Among the reasons for dissatisfaction with the domestic-tranquility justification is the fact that domestic tranquility has not proven a sufficient consideration to bar other types of intra-family litigation such as (1) tort actions for damage to property interests, and (2) personal injury actions against

> a sibling. (Citations omitted). Moreover, an increasing number of courts are of the opinion that the injury itself and not the consequent suit, is the factor which may upset domestic tranquility. (Citations omitted). (Emphasis supplied).

The most cogent rebuttal, however, of the domestic-discord justification is found in today's prevalence of liability insurance. In the steady erosion of the immunity doctrine, increasing emphasis is laid upon the mitigation factor which liability insurance brings into a negligence action between family members. (Citations omitted).

> Since it is the apprehension of domestic discord which, in large measure, gives rise to the immunity doctrine, to the extent liability insurance assuages that concern, it becomes a determinative consideration in deciding whether the doctrine should be adopted. . ." (Citations omitted). (Pg. 672).

Thus, the Delaware courts have recognized the faults contained in the domestic tranquility policy underlying the antiquated doctrine.

These decisions readily show the courts dissatisfaction with the logic of the argument upon which retention of the doctrine is based. This rule when originally formulated was based on a societal condition which has long since passed. Applied to today's condition, the

rule is arbitrary and the discriminations contained therein are patently without reason.

THE DECISIONS RELIED UPON BY THE DELAWARE SUPREME COURT IN HOLDING THERE ARE NO FEDERAL LIMITATIONS ON THE DOCTRINE ARE INAPPLICABLE.

The decisions relied upon by the Delaware Supreme Court in holding there are no federal limitations on the doctrine are inapplicable. In Paiewonsky v. Paiewonsky, 446 F.2d 178 (C.A. 3, 1971), cert. den., 405 U.S. 919, 30 L. Ed. 2d 788, 92 S. Ct. 944, the Court ruled against only the contention that interspousal tort immunity discriminates against women who marry in that it compels them to suffer damages without recourse available to other persons, solely because of their marital status. It is not being asserted that the Delaware Law of Interspousal Tort Immunity results in gender discrimination. Certainly such is not the case. Thus, the Delaware Courts reliance on Paiewonsky is misplaced with respect to the issue raised by the appeal.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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